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No. 944

IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1927.

DANIEL J. SHIELDS, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. LOWRY HUMES,
Attorney for Petitioner.

1209 First National Bank Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT ST., PITTSBURGH, PA.

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IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1927.

DANIEL J. SHIELDS, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the undersigned, Daniel J. Shields, respectfully presents:

That your petitioner was placed upon trial at a regular term of the United States District Court for the Western District of Pennsylvania on the 8th day of February, 1926, on an indictment containing five counts. The first count charged a conspiracy to violate the provisions of Section 3 of Title II. of the Act of October 28, 1919, known as the National Prohibition Act. The second, third, fourth and fifth counts charged the direct violation of Section 3, Section 25 and Section 21 of the National Prohibition Act.

That the jury, on February 13, 1926, found your petitioner not guilty on the second, third and fourth counts and guilty on the first count and recommended him to the mercy

of the Court. As to the fifth count in the indictment, the verdict is silent. On June 12, 1926, your petitioner was sentenced to pay a fine of Two Thousand ($2,000.00) Dollars and to be imprisoned in the Cambria County Jail for the term of one year.

That this case was duly appealed to the Circuit Court of Appeals for the Third Circuit and came on to be heard in the Circuit Court of Appeals for the Third Circuit, on the 10th day of November, 1926, and that upon the 11th day of January, 1927, the Opinion of the Circuit Court of Appeals was delivered and filed, affirming the judgment of the District Court against your petitioner, Daniel J. Shields.

That upon the 7th day of February, 1927, your petitioner filed his Petition and Brief in support thereof in the Circuit Court of Appeals, praying for a rehearing of the case, and on February 14, 1927, a rehearing was denied.

That after the jury had retired to deliberate upon a verdict, and after having deliberated all night and having twice returned to the Court for further instructions, the said jury, after having been in deliberation for more than twenty-four hours, sent to the Trial Judge at chambers the following note:

> "To the Honorable Court:
>
> Sir:
>
> We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.
>
> (Signed) E. B. MILLIGAN,
> *Foreman.*"

Whereupon the Trial Judge, in the absence of your petitioner and his counsel, and without their knowledge, sent to

the jury, which was deliberateing in its jury room, the following written instruction:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

(Signed) F. P. SCHOONMAKER,
Judge."

That the Circuit Court of Appeals for the Third Circuit, in affirming the judgment of the United States District Court for the Western District of Pennsylvania, has decided an important question of general law in an untenable way and in conflict with the weight of authority.

That the said Circuit Court of Appeals has decided a federal question in such a manner as to be in conflict with the applicable decisions of this Court, as announced in its opinions in the case of *Bucklin v. United States,* 159 U. S. 682; 16 Supreme Court Reporter 182, and *Fillipon v. Albion Vein Slate Company,* 250 U. S. 76; 39 Supreme Court Reporter 435; *Hopt v. Utah,* 110 U. S. 574; 4 Supreme Court Reporter 202, and has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such departure by the United States District Court for the Western District of Pennsylvania, as to call for the exercise of this Court's power of supervision, and further, that the judgment of the Circuit Court of Appeals deprives your petitioner of his constitutional right to be tried by the law of the land, and disregards and violates Section 1036 of the Revised Statutes of the United States.

That your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals for the Third Circuit is erroneous, and that this Court should require the said case to be certified to it for its review and determi-

nation in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record, and all proceedings in said Circuit Court of Appeals in the said case therein entitled "Daniel J. Shields, plaintiff-in-error, v. the United States, No. 3512, October Term 1926" to the end that said case may be reviewed and determined by this Court, as provided by Section 240 of the Judicial Code of the United States, as amended by the Act of Congress of February 13, 1925, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals for the Third Circuit in said case and every part thereof may be reversed and remanded by this Court.

And your petitioner will every pray.

.....

Petitioner.

State of Pennsylvania,
County of Allegheny. } ss:

Personally appeared before me, a Notary Public, in and for the county and state aforesaid, Daniel J. Shields, who being duly sworn according to law deposes and says that he has read the foregoing petition, and that the same is true as he is informed and verily believes, and that his knowledge is derived from the record and from what

has taken place in his presence and hearing in the proceedings in this case.

.....

Sworn and subscribed to before me this.....day of February, 1927.

.....

Notary Public.

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this Court.

Dated at Pittsburgh, Pennsylvania, this.....day of March, 1927.

.....

Counsel for Petitioner.

Statement of the Case.

The petitioner, Daniel J. Shields, and a number of other persons, were indicted on an indictment containing five counts. The first count charged a conspiracy to violate the provisions of Section 3 of Title II. of the Act of October 28, 1919, known as the National Prohibition Act. The other four counts charged violations of Sections 3, 21 and 25 of the National Prohibition Act.

On February 8, 1926, he entered a plea of not guilty and the case proceeded to trial. The trial of the case was completed on Friday, February 12, 1926, whereupon the jury retired to deliberate upon a verdict. On February

13, 1926, the jury sent a written communication to the trial judge in the form of a verdict as follows:

> "To the Honorable Court:
> Sir:
>
> We, the jury find the defendants, John G. Emmerling, Charles Lynch, not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts, Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.
>
> (Signed) E. B. MILLIGAN,
> *Foreman.*"

(Record, 26), and in reply thereto the trial judge sent the following written instruction to the jury.

> "Feb. 13, 1926.
>
> The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.
>
> F. P. SCHOONMAKER,
> *Judge.*"

(Record, 26.) That the foregoing instruction was requested and given in the absence of and without the knowledge of Daniel J. Shields, defendant, and his counsel (Record, 55 and 57).

That no knowledge came to the defendant or his counsel of the presentation of said tentative verdict and the written instructions given by the Court in reply thereto until the 21st day of April, 1926, and on the 22nd day of April, 1926, the same were filed (Record, 26). Thereupon, the defendant, Shields, presented his petition to the Court, setting forth the facts and asking the Court to grant an exception (Record, 54 and 55).

On the third of May, 1926, the Court issued an order refusing to grant an exception, assigning as his reason

for refusing an exception "that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict." The Court granted an exception to the order refusing the exception requested (Record, 57).

The trial Court, by an order entered on the argument list and without filing an opinion, denied the motion for a new trial (Record, 7), an exception was noted and a bill sealed to that order. The written instructions given to the jury by the Court on February 13 in the absence of and without the knowledge of the defendant and his counsel and the Court's refusal to seal a bill of exception were assigned as error in the Third and Fourth Assignments of Error (Record, 67, 68, 69, 70 and 71).

In the Circuit Court of Appeals for the Third Circuit the case was argued on the 10th day of November, 1926, and on the 11th day of January, 1927, the Court rendered its opinion, affirming the judgment of the District Court, wherein it asserts that the defendant's rights had been waived or forfeited by the conduct of his counsel. The only thing in the record indicating the conduct and the request of counsel referred to is contained in the order of the District Court of May 3, 1926, refusing to grant an exception to the additional written instructions sent by the trial judge to the jury on February 13, 1926, and in that order the Court assigned as its reason for such refusal "that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict, and therefore when the Court received the communication from the jury it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the Court from the jury." The record does not contain any such request from defendant's counsel, the only evidence of

such request being the conclusion of the trial Court above quoted.

Upon the filing of the opinion of the Circuit Court of Appeals for the Third Circuit, a petition was presented for rehearing, in which all of the facts are set forth (R. 84-99), together with correspondence between defendant's present counsel and the trial judge (Record 92 to 99). That petition and the statement of the trial judge establish the following facts:

The jury, after trial, argument and charge, retired for deliberation on Friday afternoon, February 12, 1926. The jury remained in deliberation all night, and on Saturday morning, February 13, 1926, just before the convening of court, and a few minutes before 10 o'clock, Percy Allen Rose, counsel for your petitioner, and Assistant United States Attorney Richardson, went to the chambers of the trial judge before he had gone upon the bench and they both requested that the jury be held in deliberation until they should agree upon a verdict. Daniel J. Shields, the defendant and petitioner, was not present at the time this request was made and no one was present but the trial judge, Richardson and Rose. At the time this suggestion and request was made the jury had not been brought into Court for additional instructions. The trial judge cannot now recall the exact language used either by Mr. Rose or Mr. Richardson in requesting that the jury be held in further deliberation until they should agree upon a verdict. At about 10 o'clock the same morning (Saturday, February 13, 1926), the jury came into Court for further instructions on the question of entrapment, the additional instructions given by the Court at that time not being stenographically reported. After the jury had retired again they deliberated further until 2:30 o'clock on Saturday afternoon, February 13, 1926, when they returned to the Court in the absence of the

defendant and his counsel and advised the Court that they were unable to agree. There is no stenographic or other record as to what was said or just what occurred. Thereupon the jury returned for further deliberation and between 4:30 and 5:00 o'clock that afternoon the jury sent to the Court at chambers the following written communication:

"To the Honorable Court,
Sir:

We, the jury find the defendants, John G. Emmerling, Charles Lynch, not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts, Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

(Signed) E. B. MILLIGAN,
Foreman."

and that upon the receipt thereof the trial Court replied in writing, in the absence of and without the knowledge of the accused and his counsel, the following instructon:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

About a half hour later the verdict complained of was returned by the jury, wherein your petitioner was found guilty on the first count of the indictment and recommended to the mercy of the Court. A verdict of not guilty was returned on the second, third and fourth counts.

The petition for a rehearing having been denied, the petition to this Court for a certiorari to the United States Circuit Court of Appeals for the Third Circuit is presented.

Assignments of Error to be Urged.

The third and fourth assignments of error are urged upon the attention of the Court and they are as follows:

"ASSIGNMENTS OF ERROR.

Filed June 12, 1926.

And now, June 12th, 1926, comes Daniel J. Shields, the above named defendant, and files herewith his petition for a writ of error to the Circuit Court of Appeals of the United States for the Third Circuit thereof, and says that there are errors in the record and proceedings of the above entitled case and for the purpose of having the same reviewed in the said Circuit Court of Appeals assigns the following errors:

* * * * * * * *

Third. The jury having deliberated for several hours and having reported to the Court its proposed finding or verdict, as follows:

'To the Honorable Court,

Sir:

We, the jury find the defendants, John G. Emmerling, Charles Lynch, not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

(Signed) E. B. MILLIGAN,
Foreman.'

The Court erred in further instructing the jury in writing as follows, to wit:

'Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge.'

Four. The Court erred in refusing to grant the prayer of the petition of the defendant, Daniel J. Shields, for an exception to the written instructions to the jury in the absence of the said defendant or his counsel, after they had deliberated for several hours and returned to the court room for further instructions, that they would have to find whether or not the defendants, Shields, Widman and Gastman were guilty or not guilty, which petition and order of the Court thereon are as follows:

'The petition of Daniel J. Shields respectfully represents:

1. That he is one of the defendants in the above stated case.

2. That in the trial thereof he was represented by Percy Allen Rose and Charles E. Copeland as attorneys.

3. That after the said case was submitted to the jury it retired and deliberated for several hours.

4. That during the course of the jury's deliberation it submitted to the court the following tentative verdict and asked for instruction from the court thereon, to wit:

"To the Honorable Court,
Sir:

We, the jury find the defendants, John G. Emmerling, Charles Lynch, not guilty on all counts; E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts; Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

(Signed) E. B. MILLIGAN,
Foreman."

5. That in response to the jury's request for further instructions the trial judge instructed them further in writing as follows:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

6. That neither your petitioner, the said defendant, nor either of his attorneys was present in court at the time of the submission of the said tentative verdict and the said additional instructions in writing by the court.

7. That neither your petitioner, the said defendant, nor either of his attorneys had any knowledge or notice at the time of the submission of the said tentative verdict and the said additional instructions in writing by the court.

8. That neither the petitioners, the said defendants, nor either of his attorneys had notice of the submission of the said tentative verdict and the said additional instructions in writing by the court until the 21st day of April, 1926.

9. That if your petitioner, the said defendant, or either of his attorneys had received notice of the submission of the said tentative verdict and the said additional instructions in writing by the court objection would have been urged to the said additional instructions by your petitioner's said attorneys.

10. That under the act of June 1, 1872, C. 225, Section 10, Sec. 1702 Judicial Code (R. S. Sec. 1026), U. S. Compiled Statutes 1916, Vol.

3, page 3560, the jury was permitted to find some of the co-defendants with your petitioner guilty, others not guilty and disagree as to others of the said defendants.'

Your petitioner, therefore, respectfully prays the Court to grant and note him an exception to the said additional instructions in writing by the Court to the said jury.

DANIEL J. SHIELDS.

State of Pennsylvania,
County of Cambria. } *ss:*

On the first day of May, A. D. 1926, before me, the subscriber, a notary public in and for said county, personally came Daniel J. Shields, the above named petitioner, who, being by me duly sworn according to law, did depose and say that the matters set forth in the above and foregoing petition are true and correct.

DANIEL J. SHIELDS.

Sworn and subscribed to before me the day and year aforesaid, as witness my hand and notarial seal.

DULCIE G. GATES,
[SEAL] *Notary Public.*

My commission expires January 20, 1930.

ORDER.

And now, May 3rd, A. D. 1926, the above and foregoing petition read and considered and the prayer thereof is hereby refused and the court refuses to grant the said defendant, Daniel J. Shields, an exception to

the said additional instructions in writing by the court to the said jury, to wit:

"'Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge.'

for the reasons that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict and therefore when the court received the communication from the jury it was returned with the instructions complained of although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.

PER CURIAM,
S."

Argument and Brief on Petition for Rehearing.

The appellant is charged with a violation of Section 37 of the Criminal Code, and the offense charged is a felony (Crim. Code Sec. 335).

It is respectfully submitted that the Circuit Court of Appeals, in considering and disposing of the third and fourth Assignments of Error, attached unwarranted importance to the conclusion arrived at by the Trial Court. The original record contained none of the facts which were the basis of the Trial Court's conclusions, and the impropriety of the Court reaching conclusions and determining issues from occurrences and statements outside of and forming no part of the record, must be apparent.

After the Circuit Court of Appeals based its judgment entirely upon a finding or conclusion of the Trial Court in the absence of any facts in the record to support it, the petitioner presented his petition for a rehearing and in connection with that petition secured from the Trial Court a statement of the facts, and consequently the record now discloses, as fully as it has been possible to ascertain them, the facts, circumstances and conditions surrounding the occurrences upon which the conclusion of the Trial Court was based. These facts are presented in the correspondence between appellant's counsel and the Trial Court, and attached to the petition for rehearing in the Circuit Court of Appeals (R. 96 to 99).

The conclusions of the Court as to what occurred appear only in the Order of the Trial Court of May 3, 1926 (Record, page 71), which reads as follows:

> "And now, May 3rd, A. D. 1926, the above and foregoing petition read and considered and the prayer

thereof is hereby refused and the court refuses to grant the said defendant, Daniel J. Shields, an exception to the said additional instructions in writing by the court to the said jury, to wit:

'Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge.'

for the reasons that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict and therefore when the court received the communication from the jury it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.

PER CURIAM,
S."

The Circuit Court of Appeals apparently assumed that the request referred to was made in open Court and with the knowledge and consent, or at least without the objection of the appellant.

The fact is that the request of defendant's counsel referred to was not made in Court, nor in the presence of the defendant. It was made in a private conversation in the chambers of the Trial Court. It did not get into the record of the case nor came to the attention of the defendant.

On Saturday Morning, February 13, shortly after the request was made, the jury, which had deliberated all

night, returned for further instructions on the question of entrapment. These additional instructions were given by the Court and the Court sent the jury out for further deliberation. The jury continued to deliberate until 2:30 o'clock in the afternoon, when they returned to the Court in the absence of the defendant and his counsel, and advised the Court that they were unable to agree. There is no record as to the instructions given to them at this time by the Court. It was at this time discretionary with the Court whether the time had arrived when the jury should be discharged as unable to agree, or whether they should be sent back for further deliberation under proper instructions. No error is assigned in connection with this occurrence.

The jury remained in deliberation until between 4:30 and 5:00 o'clock Saturday afternoon, at which time they sent a written communication in the form of a verdict to the Court (page 26 of Record) as follows:

"To the Honorable Court:
Sir:

We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

(Signed) E. B. MILLIGAN,
Foreman."

Neither the defendant nor his counsel were present or had knowledge of this communication. The Court immediately sent to the jury room the following written instruction, which is assigned as error in this case:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

Had the Court at this time called the jury in and instructed them on the desirability of agreeing on a verdict of guilty or not guilty, and have given proper instructions, an entirely different question would be involved than the one which is here presented.

The Court, when it sent a written instruction, without the knowledge of the defendant or his counsel to the jury that they would *"have to find"* whether the appellant was guilty or not guilty,

(a) Disregarded the positive provisions of Section 1036 of the Revised Statutes, Sect. 1702, Judicial Code U. S. Compiled Statutes, 1916, Vol. 3, page 3560, which provides as follows:

> "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury",

and

(b) Coerced the jury, which, by its reports to the Court, was shown to be reluctant to agree upon a verdict, and

(c) Refused to accept a perfectly good and valid form of verdict already submitted, and

(d) Coerced the jury into returning a compromise verdict, finding the defendant not guilty on the second, third and fourth counts, but guilty on the first count, and recommending him to the mercy of the Court.

It is further contended that it was error for the Court to communicate with the jury while it was in deliberation, regardless of the form of the instructions, in the absence of the defendant and his counsel, and an abuse of judicial power to refuse an exception to the defendant when it was asked for as soon as knowledge of the written instruction came to him.

In this connection, it is suggested also, and it is submitted that the Court should take judicial notice thereof, that it has never, within recent years, been the custom for the United States Disrict Court for the Western District of Pennsylvania to be in session on Saturday afternoons, and that the definitely established adjourning time of that Court, even on the days when afternoon sessions are held, is 4 o'clock P. M., and there can therefore, be no proper presumption, in view of the recorded facts to the contrary, that the accused was, or should have been, present.

I.

IT WAS ERROR FOR THE COURT TO COMMUNICATE WITH THE JURY IN THE ABSENCE OF APPELLANT AND HIS COUNSEL.

On this question the rule is the same in both criminal and civil trials.

The judgment of the Circuit Court of Appeals is in direct conflict with the decision of this Court in *Fillippon v. Albion Vein State Company*, 250 U. S. 76, 63 Law Ed. 853.

That case was considered by the Supreme Court of the United States on a *certiorari* to the United States Circuit Court of Appeals for the third circuit, to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania, in a civil case in which the jury, after retiring, sent to the judge a written inquiry, to which the trial judge replied in writing, in the absence of the parties and their counsel, without their consent and without calling the jury in open court. The Supreme Court of the United States, in an opinion delivered by Mr. Justice Pitney, says:

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impanelled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the

presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. See *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 390, 32 L. Ed. 439, 442, 9 Sup. Ct. Rep. 101; *Aerhart v. St. Louis, I. M. & S. R. Co.* 40 C. C. A. 171, 99 Fed. 907, 910; *Yates v. Whyel Coke Co.*, 137 C. C. A. 327, 221 Fed. 603, 608; and many decisions of the state courts collated in 17 L. R. A. (N. S.) 609, note to *State of North Dakota v. Murphy*, 17 N. D. 48, 115 N. W. 84, 16 Ann. Cas. 1133.

The circuit court of appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred,—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place, and given the opportunity of excepting to the substance of the instruction and to the manner of giving it,—no harm had been done, and none was probable to arise under like circumstances, and hence affirmed the judgment.

It is not correct, however, to regard the oppor-

tunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may consider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. *United States v. United States Fidelity & G. Co.* 236 U. S. 512, 529, 59 L. ed. 696, 704, 35 Sup. Ct. Rep. 298; *Guerini Stone Co. v. Carlin Constr. Co.*, 248 U. S. 334, 348, 39 Sup. Ct. Rep. 102."

That any communication between the judge and jury after they have retired to deliberate upon the verdict, except in open court, is improper, is well established. *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185, is a leading case upon this question, and has been extensively followed by the courts of other states. In that case, after the jury had been out six hours, the foreman wrote to the judge that they could not agree, and awaited his directions. The judge returned a written answer saying he was unwilling that they should separate, and giving them such directions as would enable them to reconsider the case in a more systematic manner, and directing that the communication be returned into court. After this a verdict was reached in favor of defendants. The court held that, while no complaint could be made as to the substance of the communication, a new trial should be granted because there should be no communication whatever between the judge and jury except in open court, and, when practicable, in the presence of counsel.

In the following cases it was held to be error for the court to send additional instructions to the jury room without the consent of, or notice to, parties or counsel: *Sommer v. Huber,* 183 Pa. 162, 38 Atl. 595; *Read v. Cambridge,* 124 Mass. 567, 26 Am. Rep. 690 (though answer to jury admitted to be correct); *Chicago & A. R. Co. v. Robbins,* 159 Ill. 598, 43 N. E. 332; *Taylor v. State,* 42 Tex. 504; *Quinn v. State,* 130 Ind. 340, 30 N. E. 300 (instruction merely as to return of verdict); *Fish v. Smith,* 12 Ind. 563; *Fox v. Peninsular White Lead & Color Works,* 84 Mich. 676, 48 N. W. 203; *Hall v. State,* 8 Ind. 439 (withdrawing two erroneous instructions); *State v. Patterson,* 45 Vt. 308, 12 Am. Rep. 200 (answering question as to manslaughter and sending jury statute on the point; both actions error); *Norton v. Dorsey,* 65 Mo. 376 (jury called back to court room, but all others excluded except deputy sheriff); *Smith v. McMillen,* 19 Ind. 391 (sending written instructions, given orally at the trial).

It was also held to be error for the judge to answer questions sent by the jury without the consent of counsel, without regard to the nature of the communication, in *O'Connor v. Guthrie,* 11 Iowa, 80; *Johnson v. State,* 100 Ala. 55, 14 So. 627; *Hopkins v. Bishop,* 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902; *State v. Alexander,* 66 Mo. 148 (answering written question sent by juror, and also holding conversation with juror about possibility of agreement); *Goode v. Campbell,* 14 Bush, 75; *Low v. Freeman,* 117 Ind. 341, 20 N. E. 242 (improper, though answer given was correct); *Kehrley v. Shafer,* 92 Hun., 196, 36 N. Y. Supp. 510 (giving amount of plaintiff's claim); *Chouteau v. Jupiter Iron Works,* 94 Mo. 388, 7 S. W. 467; *Bunn v. Crowl,* 10 Johns, 239; *Neil v. Abel,* 24 Wend. 185 (justice sent minutes of trial to the jury at their request). In *Coolman v. State,* 163 Ind. 503, 72 N. E. 568 (in which

the judge, in effect, told the jury that a verdict of disagreement could not be received); and in *State v. Kiefer,* 16 S. D. 180, 91 N. W. 1117, and *McBean v. State,* 83 Wis. 206, 53 N. W. 497 (in which the judge, in effect, informed the jury that he would consider a recommendation of mercy), it was held that no communication should be had, though the answers themselves in these cases were doubtless prejudicial. The same result was reached in *Ruckersville Bank v. Hemphill,* 7 Ga. 396; *State v. Frisby,* 19 La. Ann. 143; and *Chinn v. Davis,* 21 Mo. App. 363,—when a juror left the jury room and held some conversation with the judge.

A number of cases have arisen in which the judge has entered the jury room, in which such conduct has been held reversible error.

Thus, in *Hurst v. Webster Mfg. Co.,* 128 Wis. 342, 107 N. W. 666, the jury, after deliberating some time, sent a request to have the pleadings and papers in the case. The judge went to the jury room, and, standing in the doorway, told them he could not grant the request, but did inform them as to some undisputed figures and amounts. The court, speaking of the rule that no communication should be had between judge and jury after submission of the case, except in open court, says:

> "All court proceedings should be in the open; there should be no opportunity for the doing of things in a corner, nor should a defeated party be required to show that such a communication as was here had was in fact prejudicial. He is entitled to have his case tried in open court from start to finish. There is safety in no other rule."

Similar results were reached in *Abbott v. Hockenberger,* 31 Misc. 587, 65 N. Y. Supp. 566, in which the

justice was asked if verdict would carry costs, and answered, "Yes;" *Hudson v. Stearns,* 75 N. Y. Supp. 735, in which the justice answered through the doorway that costs must follow the judgment; in *Benson v. Clark,* 1 Cow. 258, in which the justice went into the jury room, but did not answer the question asked, and, shortly after, sent a certain paper to the jury at their request, both acts being held reversible error; *Havenor v. State,* 125 Wis. 444, 104 N. W. 116, in which the judge stepped to the door of the jury room, and, being asked a question, told the jury he could not answer it, but that the point was covered by his charge; *Kirk v. State,* 14 Ohio 511, in which one of the associate judges, on request of the others, went to the jury room during adjournment and explained the charge to them, it being held that this violated the constitutional right to a public trial; *Ducate v. Brighton,* 133 Wis. 628, 114 N. W. 103 in which the judge went to the jury room, taking the stenographer to report all that was said, and announced that the sheriff would take them to supper, and cautioned them as to their conduct while at the meal; *High v. Chick,* 81 Hun., 100, 1 N. Y. Anno. Cas. 1, 30 N. Y. Supp. 652, in which the jury was left to deliberate in the trial room, and the court said the error could have been avoided by the justice announcing the court open and inviting the attorneys in; *Hoberg v. State,* 3 Minn. 262, Gil. 181, in which the judge merely informed the jury that they should come into open court if they wanted further instructions (see *Oswald v. Minneapolis & N. W. R. Co.,* 29 Minn. 5, 11 N. W. 112, and *Helmbrecht v. Helmbrecht,* 31 Minn. 504, 18 N. W. 449, for modifications of this case); *Gibbons v. Van Alstyne,* 29 N. Y. S. R. 461, 9 N. Y. Supp. 156, in which the justice entered the jury room, but nothing was shown as to there being any conversation with the jury; *Valen-*

tine v. Kelley, 54 Hun., 78, 26 N. Y. S. R. 481, 7 N. Y. Supp., 184, in which a justice merely suggested to the jury that they try to agree on a verdict, no partiality or coercion being shown; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558, in which, by direction of the judge, a written statement of the stenographer that a certain question was not asked, was sent to the jury room; *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694, and *Stager v. Harrington*, 27 Kan. 414, in which it was held error for the judge to enter the jury room, and that in such cases the court will not inquire into the effect of such entry; *People v. Linzey*, 79 Hun, 23, 61 N. Y. S. R. 240, 29 N. Y. Supp. 560, in which the judge, in answer to a question by a juror as to what the charge was against the defendant, answered "petit larceny"; *Lester v. Hays*, 14 Tex. Civ. App. 643, 38 S. W. 52; *State v. Bland*, 9 Idaho, 796, 76 Pac. 780; *People v. Bowers*, 111 N. Y. Supp. 623, in which the judge answered the question as to the nature of the offense and punishment. In *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976, the court said: "An act, a sentence, or a word, from the presiding judge, may exert a controlling influence on the verdict. It is for these reasons that a communication by the judge to the jury stands on a different basis from that of another person, and, for a like reason, the law should throw a higher degree of circumspection around such communications."

In the case of *State of North Dakota v. Murphy*, a criminal case, in which the defendant was charged with forgery, 17 L. R. A. (N. S.) 619, the trial judge, at the request of the jury, went to the door of the jury room and addressed the jury as follows: "Good evening, gentlemen. I understand you want to see me. Have you agreed?" To which the foreman of the jury answered: "No. I think we cannot agree." Whereupon, the trial judge re-

plied: "I will ask you to consider the matter further. Good night." The appellate court thereupon declared:

> "As to the purity of the intentions of the judge in going into the jury room in this case, and there having the brief communication with the jury, no certificate or proof is necessary so far as this court is concerned, as it well knows that his uprightness and sincere desire to be absolutely just and fair in all cases are beyond question. That admitted fact, however, does not meet the question before us, which is: Did he do that which was beyond his judicial functions in respect to the case? We are forced to the conclusion that he did. His presence in the jury room for any kind of communication with the jury is not contemplated by any provision of the statute. The opposite is the plain inference from the statute. All communication to the jury in open court is subject to exception by the parties, if deemed improper. If any communication is made to them in the jury room in the absence of the parties, no opportunity is afforded for objections and exceptions at the time. The open court is the place for communications to the jury in the presence of, or on notice to, the attorneys. The jury room is for the jury alone, and no communications are allowed with them in the room except upon orders from the court through the officer in charge of them, who is permitted to ask them whether they have agreed upon a verdict. All communications to the jury in reference to the case should be made in open court, and all communications to them in the jury room avoided. In this way all distrust and fear that something improper is said or done will be without foundation, and every act be subject to exception and review. Any communication by word or writing not in open court affects the efficiency of jury trials

as a means of accomplishing justice after giving all parties full opportunity of being heard at all stages of the trial. A strict compliance with this practice of having all proceedings in court in the presence of counsel, or on notice to them, unless waived, is better than to countenance violations thereof unless prejudice is shown. The state urgently insists that no prejudice could have resulted from what was done or said in this case, but we shall not consider that question. However, the fact that the foreman said that he thought they could not agree when the judge first spoke to them, and that they did agree in five or ten minutes thereafter, would be a stubborn fact for consideration if we entered upon an inquiry as to the effect upon the jury of the words spoken to them and the visit to the room. We think that any communication in this way as to the case should be prohibited and held prejudicial. It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. The authorities are practically unanimous in condemning such communications, and in holding them prejudicial as a matter of law."

It is therefore respectfully submitted that it was error for the trial judge to communicate with the jury in this case in the absence of and without the knowledge of the appellant and his counsel, regardless of the nature of the instruction given.

And it is further submitted that even were the Court to place the broadest possible construction upon the al-

leged request of counsel for the appellant, it could not be construed as a request or as constituting the consent of the appellant that the Court should or might disregard the requirement of the law that the Court may only instruct the jury in open Court and in the presence of, and with the knowledge of, the accused and his counsel.

II.

THE COURT'S WRITTEN INSTRUCTION ERRONEOUS.

There is no rule of law that requires or compels a jury to agree upon a verdict of guilty or not guilty, and the members of a jury can only vote for conviction after being convinced collectively and individually by the evidence of the guilt of the accused.

This jury did not *"have to find"* the appellant guilty or not guilty, and it was a violation of the duty of a jury to so do, if there was an honest difference of opinion between the individual jurors as to guilt or innocence. While it was prejudicial error, as hereinbefore shown, for the Court to communicate any instructions to the jury while deliberating, that error is greatly aggravated by the fact that the instructions thus erroneously communicated were erroneous and would have been so adjudicated if given in open Court in a regular and proper way.

Section 1036 of the Revised Statutes of the United States declares:

> "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury."

This statute has been clearly interpreted by this court in the case of *Bucklin v. United States,* 159 U. S. 682 (16 Sup. Ct. Rep. 182) and the opinion of the Circuit Court of Appeals in the instant case is in direct conflict with the opinion of this Court in the Bucklin case. Mr. Justice Harlan, in delivering the opinion of the Court, said:

> "But there was error prejudicial to the accused in the instruction to the jury that while they might find a verdict of guilty as to all three defendants on trial, or find some guilty and some not guilty, they could not find a verdict as to some and disagree as to others.
>
> The learned assistant attorney general refers to Section 1036 of the Revised Statutes, providing that 'on an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.' He properly insists that that section is not in terms, applicable to separate indictments, tried together; but he frankly states that the instruction is so clearly erroneous as to suggest the possibility of a mistake in the bill of exceptions. * * *
>
> Take the record as disclosing all that occurred at the time the jury came into court for additional instructions, there was error in the ruling that the jury could not find a verdict as to some of the defendants, and disagree as to others. The jurors had been deliberating for three days without returning a verdict as to either of the defendants, when they were instructed that their duty was either to find each defendant not guilty or each guilty, or some guilty and the others not guilty. If some of the jurors wavered

in their minds as to the guilt of all the defendants,—and the delay in returning the verdict justifies the belief that such was the fact,—it may be that the instruction of which complaint is made worked injury to the plaintiff in error. We cannot say that it did not. To say that the court would not receive from the jury a report of a disagreement as to one defendant was, in effect, to announce that the jurors would be held together until the court should deem it to be its duty to discharge them finally, and would not be discharged unless or until they returned a verdict of guilty or not guilty. This tended to coerce the jury into making a verdict. The accused was entitled, of right, to go before a new jury if the one that tried him was unable to agree that he was guilty of the offense charged.

As it was competent for the jury to return a verdict of guilty or of not guilty as to the defendants, Thomas Bucklin and George Elder, and to report a disagreement as to Daniel A. Bucklin, the instruction complained of must be held to have been erroneous; and as this error may have injuriously affected the rights of the accused, the judgment is reversed, with directions to grant him a new trial."

The Bucklin case is a ruling case; and it not only clearly holds that an instruction such as was given in this case is erroneous, but also that it is sufficiently prejudicial to the defendant to require that a new trial be granted. The facts in that case are astonishingly similar to the facts in this case, because in that case the jury, after it had deliberated for some time, asked the Court if they could find a verdict as to some defendants and disagree as to others, and were told by the Court that they would have to find each defendant either guilty or not

guilty. In this case, just as in the Bucklin case, the Jury was instructed that they must find each defendant as to whom they had reported a disagreement, guilty or not guilty.

No reasonable construction that can be placed upon the so-called request of appellant's counsel to the trial court in his chambers, outside of the court room, and without the knowledge of the appellant, can be broad enough to justify the Court in giving an instruction in defiance of Revised Statutes, Section 1036.

It was beyond the power of the Court to reach an understanding with counsel for the accused and the Government, by which the Court was to ignore, disregard and set aside the positive provisions of an Act of Congress, and my unfaltering faith in the Trial Judge convinces me that the instruction complained of was written hastily, and that in the haste the Act of Congress was entirely overlooked. This conviction, which I believe is the only reasonable conclusion to draw from the state of this record, emphasizes anew the propriety of the rule of law hereinbefore referred to, which prohibits communications between the Trial Judge and a jury while the jury is deliberating in the absence of, and without the knowledge of, the defendant and his counsel. It is probable, in this case, that had the instruction complained of been given in open Court in the presence of the parties, the Act of Congress would have been called to the attention of the Court, when an exception was asked for, and that the error would thereupon have been corrected.

III.

THE INSTRUCTION COMPLAINED OF CONSTITUTES A COERCION OF THE JURY.

When the Trial Court instructed the jury that they *"have to find"* the appellant guilty or not guilty, he gave them an instruction, the only effect of which could be to coerce the jury into a verdict. The instruction would have been no more positive and forceful had it directed that the jury *must* find the appellant guilty or not guilty. While this instruction would have been erroneous and have constituted a coercion of the jury, if given at the time of and in connection with the general charge, yet its erroneous character and coercive effect is greatly accentuated when considered in connection with the facts in this case.

The jury had been deliberating for more than twenty-four hours. They had received additional instructions on the question of entrapment. More than two hours before the instruction complained of was given, they had returned to the Court and informed the Court that they were unable to agree as to the appellant, and the Court had thereupon sent them back under what we presume was proper instruction. Saturday night was fast approaching, and with an apparent abandonment of hope that a further agreement could be arrived at, they sent to the Court the written communication, which was in the form of a verdict. In this so-called tentative verdict, they found part of the defendants not guilty, part of them guilty, and declared their inability to agree as to the guilt or innocence of the appellant. Had they come into Court with this verdict, instead of merely sending it by a bailiff to the Court, it would have been such a verdict as the Court could, under the law, have properly accepted. Upon its receipt,

however, the Court, without explanation of any kind, sends them the written instruction assigned as error, telling the jury what they will *"have"* to do. In effect, it tells them that they *must* find the appellant guilty or not guilty. It was a mandatory direction, and the only logical deduction which the jury could draw from such a requirement was that the jury would remain locked up in deliberation until the requiremnet of a verdict of guilty or not guilty had been complied with. That the jury were reluctant to reach such a decision is apparent.

And it is further apparent from the verdict, which this instruction induced about a half hour later, that some of the members of that jury surrendered their convictions and opinions in order that the requirement of the Court might be met. The verdict justifies the conclusion that the Court's mandatory instructions drove the jury to a compromise, in order that they might be relieved of further consideration of the case, and in arriving at that compromise they eased their consciences by finding the appellant guilty on only one count and recommending him to the mercy of the Court.

On three counts they acquitted him. It is interesting to note in this connection that the indictment upon which the appellant was tried contained five counts. Yet the verdict, coerced, as we believe it was, by the instructions of the Court, and hastily arrived at during the falling shades of Saturday night, only disposes of four of the counts contained in the indictment, insofar as it relates to the appellant. This, in itself, is some indication of the care and the consideration which this divided jury gave to the compromise which they felt compelled, as the result of the Court's instruction, to arrive at.

The error which was held to constitute coercion in

the case of *Peterson v. United States,* 213 Fed. 920, is trifling as compared with the error assigned in the case at bar.

The Circuit Court of Appeals for the Eighth Circuit in the case of *Nigro v. United States,* 4 Fed. (2nd), 781 held that (syllabus):

> "After jury failed to agree, and court had told foreman that it would not ask him to say how jury stood, question asked him whether predominance of individual jurors was one way or the other, eliciting answer that there was predominance, held error.
>
> Where jury had deliberated for some time, supplemental instruction as to reaching agreement, consisting of abstract statement from opinion in another case, held erroneous, as forcibly urging deference by minority of jury to view of majority without properly calling attention to positive duty of each juror to form and make his verdict express his own honest conviction."

and the same Court, in *Edwards v. United States,* 7 Fed. (2nd) 598, held (syllabus):

> "Where jury had deliberated after submission of the case for 24 hours, and, being brought into court, reported their inability to agree, and that they had made no substantial progress, and court thereupon asked foreman whether point in dispute was a matter of law, and foreman replied, 'I don't think it is,' act of court in proceeding as though it were a matter of law caused the disagreement, and again summing up and charging jury on the controlling points in the case in language that was not free from argument, and concluding with language which was at least in some degree calculated to coerce a verdict, constituted reversible error."

IV.

DUE PROCESS OF LAW DENIED APPELLANT.

The Constitution guarantees to the appellant the right to be tried by the law of the land. He was, therefore, entitled to be present at every stage of the proceeding, and especially at all times when the Court was giving instructions to the jury charged with the trial of the case against him. He was also entitled to the benefit of the provisions of Section 1036 of the Revised Statutes, which regulated and prescribed the power and the right of the jury trying the case.

It is undisputed in this case that he was deprived of the opportunity and the right of being present when the Court instructed the jury that they would *"have to find"* the appellant guilty or not guilty. It might be contended, had this instruction been given in open Court, and during the usual court hours, that he had not been denied that opportunity. In this case, however, the instructions were privately communicated in writing from the Court's chambers. The defendant had neither right nor opportunity to be present; neither had his counsel. No notice of the jury's request or the Court's contemplated reply was communicated to either the defendant or his counsel, nor was any attempt made so to do. The effect of this proceeding during the trial of the case deprived the appellant of his fundamental right to due process of law.

Revised Statutes, Section 1036, was enacted to secure to a defendant a fundamental right, as well as to secure to the jurors an opportunity to perform their duties with a conscientious adherence to the oaths which they take. The

instructions of the Court completely ignored and repudiated the fundamental right which this Act of Congress accorded to the appellant, and in consequence the appellant was deprived of a trial by the law of the land.

The Circuit Court of Appeals has suggested, in its Opinion, that the so-called request of appellant's counsel, made in chambers, without his knowledge and consent, seven or more hours prior to the occurrences and the giving of the instructions complained of, operated as a waiver of all of the defendant's rights to complain of the errors hereinbefore recited. It will not be suggested that the request of counsel, in whatever words it may have been couched, was ever intended to go further than the Court could properly go under the law. It would be a startling reflection, not only upon appellant's counsel and the Government's counsel, but upon the Court as well, to even infer that the counsel suggested and that the Court acquiesced in the suggestion that:

(1) The Court should communicate with the jury in the absence of appellant and his counsel, without calling the jury into Court.

(2) That the Court should instruct the jury, in effect, to disregard Section 1036 of the Revised Statutes.

(3) That the jury should be coerced into rendering a verdict which they were reluctant to return.

V.

THE RIGHT TO DUE PROCESS CANNOT BE WAIVED.

It is further respectfully submitted that a request made by a defendant's counsel, not in the presence of the defendant, and not in open Court, during some stage of the judicial proceeding, cannot constitute a waiver of the constitutional right of a defendant to a trial by due process of the law.

In the case of *Prine v. The Commonwealth*, 18 Pa. 103, the Supreme Court of the Commonwealth of Pennsylvania held that the right of a prisoner indicted for felony to be present in court at his trial is inherent and inalienable, and that in the case of an indictment for burglary and larceny, it appearing from the record that the presence of the prisoners in court at the rendition of the verdict was waived by their counsel, the judgment was reversed, and the short but persuasive opinion of Chief Justice Gibson is as follows:

> "It is undoubtedly error to try a person for felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. Never has there heretofore been a prisoner tried for felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arranged at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment should not be pronounced against him. These things are matter of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of

the punishment does not change the character of the crime. How could the Court record them as facts, if the truth were not so? Our looseness in recording forms of procedure, especially in criminal cases—if we have any forms left—has grown till the knowledge of the principles of which they were the exponents, has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record for a conviction of murder. These irregularities strike our professional neighbors with special wonder. They have overborne resistance by force of numbers; but we have not yielded to them in the one case capital of our law. In a conviction of murder, we have required the substantive parts of a proper record to be set out so clearly as to be separable from the dross with which it is usually blended. This was in *favorem vitae*. In other felonies, it is allowable to presume that everything was rightly done till the contrary appear; but when it is stated on the record positively that the prisoner was not present, we cannot shut our eyes to the fact. What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for when a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial is inherent and inalienable. The record before us, therefore, is erroneous; but we direct that the prisoners be held to answer a fresh indictment."

It has been held in a number of cases that even the defendant himself cannot waive his right to due process, and in support of this proposition the Court's attention is invited to the Opinion of this Court in the case of *Hopt v. People of the Territory of Utah*, 110 U. S. 574, 4 Supreme Court Reporter 202, wherein that Court says:

> "But it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court room, or to their trial of the several challenges in his absence. We are of opinion that it was not within the power of the accused or his counsel to dispense with statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority.' 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense of the same kind. 4 Bl. Comm. 11. Such being the relation which the citizen holds to the public, and

the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution."

And again, in the case of *Thompson v. The State of Utah*, 170 U. S. 343, 18 Supreme Court Reporter 620, the Court, after quoting from its opinion in *Hopt v. Utah*, says:

> "If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt."

VI.

The only authority cited by the Circuit Court of Appeals in justification of its judgment is 17 C. J., sec. 3724, as follows:

> "A defendant in a criminal case cannot complain of error which he himself has invited."

In answer to this authority, it is denied that any of the errors complained of in this case were invited by the appellant. The text hereinbefore cited is supported by no note, citation or authority justifying its application to the facts and the law in the case at bar. Neither the appellant nor his counsel requested the instruction which the Court gave to the jury, that they would *"have"* to find the appellant guilty or not guilty. Neither the defendant nor his

counsel requested or invited the Court to communicate with the jury without the knowledge and presence of the appellant. Neither the appellant nor his counsel requested or invited the Court to communicate with the jury other than in open Court. Neither the defendant nor his counsel requested or invited the Court to coerce the jury into a verdict which they were reluctant to return.

A review of the authorities cited to sustain the text hereinbefore quoted will disclose that every one of them relates either to a ruling requested by the defendant or to a ruling which was more favorable to the defendant than the defendant was, under the law, entitled to. As to the purported request itself, whatever its form and wording may have been, it must be considered in the light of conditions existing at the time it was made. It could not be recognized as a progressive thing, growing to meet new conditions and intended to apply to new and unforseen situations. So, too, it must be presumed to have been, at most, a request that the Court do a lawful thing, and consequently it must be recognized as nothing more than an appeal to the discretionary power of the Court. If the error assigned in this case were an alleged abuse of discretion on the part of the Court, the request of the parties as to the manner in which that discretion should be exercised could be properly considered in this case. In the case at bar, however, the Court, after exercising its discretion by keeping the jury in deliberation until late on Saturday afternoon, committed the errors complained of, which involve not an abuse of discretion, but the positive and affirmative denial of the fundamental rights of the appellant, and by the denial of these rights coerced the jury into rendering the verdict complained of.

VII.

The Circuit Court of Appeals, in referring to the questions herein pressed, says:

> "It remains to consider one matter which is not assigned for error but which is urged upon us by counsel as a plain error apparent on the face of the record. As Rule 11 of this Court provides: 'The Court, at its option, however, may notice a plain error not assigned', we have the power to consider such error though not assigned. But after careful consideration we find no error in the Court's action."

While the Court undertakes to adjudicate the questions involved under the third and fourth Assignments of Error in conformity with the provisions of its rules, yet apparently it labored under a misapprehension as to the state of the record.

The instruction complained of was, insofar as the defendant and his counsel were concerned, a secret instruction of which they had no knowledge until weeks later, and just as soon as it came to their attention the defendant presented his petition (R. 54, 55), setting forth the facts and praying for an exception to said additional instructions. This exception the Court refused (R. 56)). The Court did, however, seal a bill of exceptions (R. 57) to its refusal to grant an exception to the additional instructions so as aforesaid secretly given to the jury.

The third and fourth Assignments cover the entire transaction. The situation with reference to exceptions only serves to emphasize the error of the Court. No defendant can be secure in his rights if a trial court is to be permitted to give instructions to a jury outside of open

Court and without the knowledge of the defendant and his counsel, and thereafter, when such instructions come to the attention of the defendant, be permitted to refuse an exception, and by so doing defeat the defendant's right to a review in an appellate court. To merely state the proposition is to condemn such a practice.

Wherefore, it is respectfully submitted that the Circuit Court of Appeals for the Third Circuit should have reversed the judgment complained of, and that by reason of the error of said Court the prayer of the petitioner for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit should be granted, to the end that said case may be reviewed and determined by this Court.

E. Lowry Humes,
Attorney for Petitioner,

1209 First National Bank Building,
Pittsburgh, Pennsylvania.